In The

Supreme Court of the United States

October Term, 1976

No. 76-1178

MIGDAD MUSA JWAYYED,

Petitioner,

against

BELL SYSTEM and their Subsidiaries New York Telephone and Telegraph, Communications Workers of America, Union International and District One, Local 1121,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

BRIEF IN OPPOSITION BY RESPONDENTS COMMUNICATIONS WORKERS OF AMERICA, UNION INTERNATIONAL AND DISTRICT ONE, LOCAL 1121

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CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Northern District of New York, Hon. Edmund Port, U.S.D.J., is unreported, but is set forth in petitioner's appendix at A-2-20. The opinion of the United States Court of Appeals dismissing petitioner's appeal from the District Court decision and denying

his application for appointment of counsel is unreported, but is set forth in petitioner's appendix at A-1.

QUESTIONS PRESENTED

1. Has petitioner complied with the time limits prescribed by Supreme Court Rule 13(2)? If not, has petitioner shown good cause for an extension of such time?

2. Did the District Court commit reversible error based upon the record before it?

STATEMENT OF CASE

This case was commenced against the respondents Communications Workers of America, Union International and District One, Local 1121 (hereinafter referred to collectively as "CWA") and others. The portions of the complaint directed against the CWA alleged the CWA violated the Civil Rights Act of 1964, Title VII (29 U.S.C. §2000[e] et seq.); 42 U.S.C. 1981 and 1983 and the Fifth and Fourteenth Amendments to the United States Constitution by breaching its duty fairly to represent the petitioner with regard to his demotion grievance in that it refused to take said grievance to binding arbitration. In addition, petitioner alleged the CWA discriminated against the petitioner, in violation of the foregoing constitutional and statutory provisions.

Following petitioner's filing and service of an amended complaint and decisions on various pretrial motions, trial was held before the Honorable Edmund Port, U.S.D.J. in Auburn, New York. The trial commenced on May 25, 1976 and was concluded on May 28, 1976. Petitioner then filed a notice of appeal from said decision dismissing the complaint with the United States Court of Appeals for the Second Circuit based upon petitioner's failure to comply with the time limits set forth in its Scheduling Order of July 1, 1976 (annexed hereto in the

appendix at page R-1) that Court granted an order dated October 26, 1976, annexed to the Petition at page A-1, dismissing his appeal. The denial of petitioner's application for appointment of counsel was based in part on the Reply Affidavit of Stuart M. Pohl sworn to on July 28, 1976 and annexed hereto commencing at page R-3 of Respondent CWA's Appendix.

REASONS FOR DENYING WRIT

I. *Petitioner has failed to comply with the time requirements of the Supreme Court Rules and 28 U.S.C. §2101.*

Supreme Court Rule 22 (3) provides a petition for a writ of certiorari in cases such as the present one ". . . shall be deemed in time when it is filed with the clerk within the time prescribed by law." 28 U.S.C. §2101, as it applies to the present case provides:

> "(c) Any other appeal or any *writ of certiorari* intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review *shall be taken or applied for within ninety days after the entry of such judgment or decree.* A justice of the *Supreme Court, for good cause shown, may extend* the time for applying for a writ of certiorari *for a period not exceeding sixty days.*" (emphasis supplied)

As indicated previously, the order of the Second Circuit was entered on October 26, 1976. Thus, pursuant to 28 U.S.C. §2101, as well as Supreme Court Rule 34(1) *petitioner's ninety days* within which to apply for a writ *expired* on or about January 24, 1977. Petitioner's petition for a writ was docketed by the Supreme Court Clerk on February 24, 1977 in an untimely fashion and, therefore, must be denied.

An additional reason for denying the present petition as untimely is found in the fact petitioner has failed properly to

apply for or obtain an extension of time from this Court to file such petition. Specifically, petitioner has failed to file an application for extension which complies with the requirements of Supreme Court Rule 22(4). In addition, if petitioner has filed such an application, such application also had to be timely in accordance with Supreme Court Rule 34(2) and had to be served on all parties including the CWA as required by Rules 34(3) and 50(2). Neither the CWA, nor its counsel, has ever received notice of such an application presumably because none has been made. Thus, having failed to properly apply for or demonstrate justification for such extension, the present petition must be dismissed as untimely.

II. *Petitioner's contentions as to the District Court's decision lack merit and should not be reviewed by this Court.*

Petitioner contends this Court should grant the writ applied for because:

> "This case presents a question to this Court which has not yet been decided, and that is whether an employee can expect to experience a certain quality of working conditions free from the degrading effect of bigotry." (P. 7)*

This Court should note the District Court squarely met that issue holding:

> "The plaintiff, I feel, would like to extend the coverage of the Civil Rights Act of 1964 to cover conduct which the act was not intended to cover. I don't think that the act was intended to turn occasional horse play or bantering into *conduct* prohibited by the act where it *was not a course of conduct condoned or participated in by either the employers or the union*, and because the plaintiff was

*All references to pages of the Petition for a Writ are cited herein as "P. ".

> of a particularly sensitive nature or lacks the same kind of background as his co-workers, or because he might be unduly and unreasonably suspicious of the conduct of others.
>
> *In this case there is no evidence that he was subjected to a concerted pattern or harassment by workers which the company and the union were aware of and didn't attempt to stop."* (emphasis supplied; A-15).

Contrary to the contentions of counsel for the petitioner discussed at pages 4 and 5 of his Petition, the District Court specifically found each of plaintiff's allegations to be unsupported by the evidence presented. Specifically, the Court found there was not a consistent course of conduct of name-calling by the Employer's employees including petitioner (A-7). In addition, as to Petitioner's contention he reported these name-calling incidents to the Employer and the CWA, the Court specifically found said defendants had acted upon such requests and had made reasonable efforts to have such horse-play discontinued (A-7, A-8). Furthermore, the Court credited the testimony of two supervisors, Burton and Bytner that the petitioner's many complaints to them were lodged only in generalities and didn't advise them of the specific language directed against him by his fellow employees (A-11). Finally, the court, based on the credible testimony presented, specifically held neither the CWA nor the employer approved or tolerated discrimination directed against the defendant (A-11, A-12). Rather, whenever petitioner brought such alleged instances to their attention, they took reasonable and prompt action to have the actions, if any, discontinued (A-12).

Petitioner also contends his testimony with regard to his work performance being excellent should have been credited. However, the Court specifically held the employer's evaluations of petitioner demonstrated his work performance was poor rather than excellent (A-6, A-12). Petitioner's claim that he was denied promotions and training flies in the face of compelling

evidence presented at trial and credited by the Court (A-6, A-11). His additional claim he was ostracized by his fellow employees and supervisors, while not directed against the CWA, was, in any event, discredited by the Court on several occasions (A-10, A-11).

The Supreme Court has uniformly held it will not become involved in resolution of factual issues unless a constitutional claim will depend on said resolution (*Berenyi* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630 [1967]), especially where such resolution "turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court . . ." (385 U.S. at p. 636).

In the present situation, petitioner's reasons for granting the writ lack merit. First, petitioner concedes the number of favorable findings dealing with *employees* calling the petitioner names were very limited (P. 5). In spite of this, petitioner contends such proof was sufficient to constitute violations of the Civil Rights Act of 1964, 42 U.S.C. §2000 e, et seq. (P. 6). Such contention completely misinterprets the impact of 42 U.S.C. §2000 e-2(c)(3) with regard to the CWA. That section provides:

> "It shall be an unlawful employment practice for a *labor organization* —
> (1) . . .
> (2) . . .
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section." (emphasis supplied).

Thus, unless the petitioner proved the CWA engaged in such activities or condoned the name-calling referred to by petitioner, there could be no finding by the lower court that the CWA had violated said section. In fact, the lower Court did weigh all the evidence presented and found the CWA, when made aware of employees' actions with regard to petitioner, made prompt and

reasonable efforts to see to it that this type of behavior ceased (A-7, A-8, A-11, A-12, A-15).

Hence, while certain *employees* at the Employer's Albany office may have engaged in horseplay with the petitioner, such behavior is *irrelevant* to petitioner's contention the CWA participated in such activities in violation of 42 U.S.C. §2000 e-2(c)(3).

While the CWA shares petitioner's belief all employees should enjoy the right to work free from discrimination, it does not believe, nor have the courts held labor organizations are liable for the actions of private citizens such as the employees at the Employer's Albany office. This is especially true when we consider the fact the CWA offered evidence, accepted and credited by the lower court, that it had always attempted promptly and reasonably to stop employees from bothering the petitioner. Certainly the Act did not require them to do more.

The cases of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *E.E.O.C.* v. *Kallir, Phillips, Ross, Inc.*, 401 F.Supp. 66 (S.D.N.Y. 1975); *Borela* v. *U.N. Corp.*, 462 F.2d 149 (10th Cir. 1972) and *Tramble* v. *Converters Ink Co.*, 343 F.Supp. 1350 (N.D. Ill. 1972), relied upon by petitioner, while correctly stated, are inapplicable to the present case. The lower court specifically considered and decided the various factual issues to which petitioner's arguments and these cases relate and rejected such claims as unsupported by the evidence. For instance, petitioner cites *Kallir*, *Borela* and *Tramble*, *supra* in support of his belief his demotion by the employer was a reprisal for his complaints of discrimination. The lower court specifically considered such contention and, based on all the evidence presented, ruled such demotion was for unsatisfactory work performance and not for reprisal (A-12, A-13). Such instance is indicative of petitioner's entire argument to this Court. Under such circumstances, we submit the lower court acted correctly in all respects.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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STUART M. POHL, ESQ.
Of Counsel

APPENDIX

CIVIL APPEAL SCHEDULING,
UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

MIGDAD MUSA JWAYYED,

Plaintiff-Appellant,

V.

BELL SYSTEM and their SUBSIDIARIES, NEW YORK TELEPHONE COMPANY & PACIFIC TELEPHONE & TELEGRAPH, COMMUNICATIONS WORKERS OF AMERICA UNION INTERNATIONAL, & DISTRICT ONE, LOCAL 1121,

Defendants-Appellees.

Docket No. 76-7300

Noting that Migdad Musa Jwayyed, appellant Pro-Se, has filed a Notice of Appeal, a Civil Appeal Pre-Argument Statement and Transcript Information, and being advised as to the progress of the appeal,

IT IS HEREBY ORDERED that the record on appeal be filed on or before July 27, 1976.

IT IS FURTHER ORDERED that the appellant's brief and the joint appendix be filed on or before September 6, 1976.

IT IS FURTHER ORDERED that the brief of the appellee be filed 30 days after the filing of the appellant's brief.

IT IS FURTHER ORDERED that ten (10) copies of each brief shall be filed with the Clerk, but that the court may require as many as fifteen (15) additional copies before final disposition of the action.

Civil Appeal Scheduling,
United States Court of Appeals, Second Circuit

IT IS FURTHER ORDERED that the argument of the appeal be ready to be heard during the week of October 25, 1976.

IT IS FURTHER ORDERED that in the event of defautlt by appellant in filing the record on appeal or the appellant's brief and the appendix by the time directed or upon default of the appellant regarding any other provision of this order, the appeal may be dismissed forthwith.

IT IS FURTHER ORDERED that if the appellee fails to file a brief within the time directed by this order, such appellee shall be subjected to such sanctions as the court may deem appropriate.

A. DANIEL FUSARO
Clerk

/s/ VINCENT A. CARLIN
By Vincent A. Carlin
Chief Deputy Clerk

Dated July 1, 1976

For assistance in your case, please call (212) 791-1054.

REPLY AFFIDAVIT OF
STUART M. POHL
SWORN TO JULY 28, 1976

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MIGDAD MUSA JWAYYED

Plaintiff-Appellant

-vs-

BELL SYSTEM AND THEIR SUBSIDIARIES, NEW YORK TELEPHONE COMPANY, AND PACIFIC TELEPHONE & TELEGRAPH, COMMUNICATIONS WORKERS OF AMERICA UNION INTERNATIONAL, AND DISTRICT 1, LOCAL NO. 1121,

Defendants-Respondents

Civ. Action #74 CV 432 #T-6195

STATE OF NEW YORK }
COUNTY OF ERIE } SS:
CITY OF BUFFALO }

STUART M. POHL, being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice before this Court and am an associate in the firm of LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, co-counsel for the CWA defendants in the above-entitled appeal, as well as in the proceedings held before the United States District Court for the Northern District of New York in this matter.

2. I make this affidavit in opposition to the plaintiff-appellant's application to have an attorney appointed for him by this Court.

Reply Affidavit of Stuart M. Pohl
Sworn to July 28, 1976

3. On page 2 of his application, sworn to on July 23, 1976, MIGDAD MUSA JWAYYED, under oath, says he is unable to afford and unable to find an attorney who will represent him in the present appeal. In addition, he swears he is presently unemployed, has not received any income within the past twelve months, from employment or other sources, and does not own any cash, savings accounts, real estate, stocks, bonds or the like.

4. While your deponent realizes the Court has discretion to appoint counsel for a party proceeding under Title VII of the Civil Rights Act, I feel it is my duty to inform this Court as to the accuracy of certain statements contained in MR. JWAYYED's affidavit.

5. At the time of the proceedings held before the United States District Court for the Northern District of New York, your deponent found it necessary to bring a motion for change of venue on behalf of the CWA defendants.

6. At the time of oral argument of the Motion for Change of Venue, held before the HON. EDMOND J. PORT, on May 4th, 1976, MR. JWAYYED personally appeared before the Court and represented to it the fact that he was employed as a travelling salesman earning a living and for that reason, did not care in which city the trial of the action would be held.

7. In addition, subsequent to the filing of this appeal, MR. JWAYYED has commenced another action against the same named defendants requesting relief based on many of the same acts alleged in the previously dismissed complaint which are the subject of the present appeal.

8. We believe it highly unjust for the various Federal Courts of this state to be abused by the plaintiff at the Court's expense.

Reply Affidavit of Stuart M. Pohl
Sworn to July 28, 1976

9. If the appellant truly believes himself aggrieved by the decision of the Lower Court in this case, we believe he should submit additional proof to the Court that he is in fact unemployed, and unable to afford to retain an attorney in this matter.

/s/ STUART M. POHL
STUART M. POHL

Sworn to before me this
28th day of July, 1976.

/s/ CHERYL A. HOOPLE
CHERYL A. HOOPLE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977